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No. 73-1100

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In the Supreme Court of the United States

OCTOBER TERM, 1973

JACK S. BURDEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner seeks review of the factual question, decided adversely to him by both courts below, whether he "willfully" failed to collect and pay over withholding and social security taxes owed by a corporation of which he was an officer. As a result, he was held personally liable for a penalty equal to the total amount of tax not paid over under Section 6672 of the Internal Revenue Code of 1954.[1]

1. The circumstances of petitioner's failure to pay over the employment taxes owed by the corporation were as follows: The corporation, CPM Constructors, Inc.

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[1]Petitioner has abandoned the argument made below that he was not the officer of the corporation vested with the responsibility of disbursing funds to meet the corporation's obligations.

("CPM"), entered into two construction contracts with Transwestern Pipeline Company of Texas ("Transwestern") in 1966. During the first two quarters (January-June) of 1967, CPM had financial difficulties in performing these contracts, which resulted in its failure to pay withholding taxes of $157,267.27 for these two quarters. As the construction progressed, CPM received more than $2.5 million in payments from Transwestern under the contracts and $200,000 from a company of which petitioner was president. CPM used these funds to meet net payroll expenses, to pay subcontractors and material suppliers, and to pay off a bank loan (Pet. App. A2-A3, B2-B5).

Petitioner had previously been the principal officer of a parent corporation of CPM and had served as chairman of CPM's board of directors. In January 1967, however, he assumed the active management of CPM and shortly thereafter became its president and chief executive officer. He became aware some time in February 1967, that CPM was having difficulty in setting aside sufficient funds for withholding taxes of its employees. He knew that taxes had to be withheld and remitted to the United States, but assumed that Transwestern would ultimately pay the taxes since it had indicated that it would meet CPM's obligations. Transwestern did not, however, make a firm commitment to pay the taxes and did not supervise petitioner's disbursement of more than $2,000,000 of CPM's funds to other creditors after petitioner became aware that CPM had ceased remitting the taxes to the government (Pet. App. A2, B4-B6).

2. The question whether a person has "willfully" failed to pay over taxes withheld from employees' salaries within the meaning of Section 6672 is es-

sentially a factual issue which must be resolved by consideration of all surrounding circumstances. See, *e.g., United States* v. *Leuschner,* 336 F. 2d 246 (C.A. 9). As used in Section 6672, the term "willfully" does not connote a criminal intent or other bad motive on the part of the responsible person. A voluntary, conscious and intentional decision to prefer other creditors over the United States is sufficient to invoke the penalty provisions of the statute. *Newsome* v. *United States,* 431 F. 2d 742 (C.A. 5); *Monday* v. *United States,* 421 F. 2d 1210 (C.A. 7), certiorari denied, 400 U.S. 821; *Dillard* v. *Patterson,* 326 F. 2d 302 (C.A. 5). Since it is undisputed that petitioner deliberately preferred other creditors over the United States after he became aware that CPM had ceased remitting the withheld taxes, there was ample evidence to support the finding of willfulness.

Petitioner attempts (Pet. 9-11) to excuse his willful failure to pay over the taxes by relying upon Transwestern's alleged control of CPM's disbursements and his alleged expectation that Transwestern would meet all of CPM's obligations. This argument, rejected by both courts below, has no factual foundation in the record. Indeed, the district court found that Transwestern did not supervise petitioner's distribution of more than $2,000,000 of CPM's funds after petitioner became aware of the tax deficiencies, and that petitioner did not receive a firm commitment that Transwestern would satisfy the tax liability (Pet. App. B4-B5).

Moreover, even assuming that Transwestern may have been liable for the taxes through a contractual arrangement with CPM, petitioner cannot avoid liability under Section 6672 simply by demonstrating the

existence of another person's duty to withhold and pay over the same taxes. *Monday* v. *United States, supra; Braden* v. *United States,* 442 F. 2d 342 (C.A. 6), certiorari denied *sub nom. Bonistall* v. *Braden,* 404 U.S. 912; *Pacific National Insurance* v. *United States,* 422 F. 2d 26 (C.A. 9), certiorari denied, 398 U.S. 937; *Cash* v. *Campbell,* 346 F. 2d 670 (C.A. 5).[2]

Petitioner further argues (Pet. 11) that his liability under Section 6672 is excused by the government's election not to seek payment of the taxes through timely levy against Transwestern for amounts due CPM under the contracts. But the government was not required to look to Transwestern for payment of the taxes. Petitioner's mere assumption that the government would collect the deficiencies from

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[2]Petitioner's suggestion (Pet. 11) that Section 3505 may be applicable to this case is unsupported by the record and is, in all events, irrelevant. That provision, added to the Code by Section 105(a) of the Federal Tax Lien Act of 1966, P.L. 89-719, 80 Stat. 1125, imposes a liability for the payment of withholding taxes upon a lender who supplies funds to an employer which are used for the payment of payroll obligations. Section 3505(b) provides that if the lender is aware that the funds are to be used for payroll and has actual notice or knowledge that the employer does not intend, or is unable, to pay the withholding taxes, then the lender is liable for the taxes in an amount not to exceed 25 percent of the amount advanced. There is no showing in this case that Transwestern had such knowledge to make Section 3505(b) applicable. But even assuming that it did have the requisite knowledge, the legislative history of the statute states that the lender's liability under these circumstances is simply an alternative statutory remedy available to the government in addition to the responsible officer's liability under Section 6672. See H. Rep. No. 1884, 89th Cong., 2d Sess., p. 21; S. Rep. No. 1708, 89th Cong., 2d Sess., pp. 22-23.

Transwestern did not justify his failure to remit the taxes in issue. *Cash* v. *Campbell, supra.*[3]

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1974.

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[3]As petitioner recognizes, the statement he quotes (Pet. 12) from *Dudley* v. *United States*, 428 F. 2d 1196 (C.A. 9) is dictum. In *Dudley*, the person responsible for paying over the withheld taxes did not become aware that the funds had not been remitted to the government until after he had lost control over corporate affairs. Here, on the other hand, petitioner supervised the distribution of more than $2,000,000 to various creditors other than the government, after he knew that the withheld taxes of CPM's employees had not been remitted.

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